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ROHM AND HAAS COMPANY
PATENT DEPARTMENT
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MAILED

OCT 13 2010

OFFICE OF PETITIONS

In re Application of
Lyn Hughes
Application No. 10/713,926
Filed: November 14, 2003
Attorney Docket No. A01290C

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ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed September 9, 2010, requesting that the above-identified abandoned application be revived on the basis of unavoidable delay.

The petition under 37 CFR 1.137(a) is DISMISSED.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)". Extensions of time under 37 CFR 1.136(a) are permitted. No fee is required for a renewed petition.

The above-identified application became abandoned for failure to timely file a reply to the Notice of Non-Compliant Amendment, mailed October 14, 2009. This Notice set an extendable period for reply of one (1) month. No reply having been received, the application became abandoned on November 15, 2009. The Office mailed a Notice of Abandonment on September 1, 2010.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.¹

Moreover, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."²

Petitioner states that Rohm and Haas Company was acquired by Dow Chemical, and in the process, its docketing system was converted to a new docketing system. However, apparently an error occurred during the conversion, as nothing appeared in the instant application as being overdue or due. Petitioner states that "all reasonable and prudent precautions were taken", and that the "new system was checked multiple times". However, petition does not state specifically what precautions were taken, or how specifically the system was checked. In fact, petitioner does not seem to have described how the conversion process occurred at all. Rather, petitioner has merely stated the conclusion that "all reasonable and prudent precautions were taken", without stating any of the facts necessary to draw such a conclusion.

It is true that a delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of

¹ In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

"unavoidable" delay, provided it is shown that: (1) the error was the cause of the delay at issue; (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and (3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the due exercise of due care. See MPEP 711.03(c)(III)(C)(2).

Here, however, based on the facts currently submitted, it is not clear whether the error at issue occurred by the employee in the performance of a clerical function, whether the error occurred by an attorney, etc.


If petitioner can not establish that the entire delay was unavoidable, petitioner may wish to consider reviving the application pursuant to 37 CFR 1.137(b). A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(m); and (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
 Commissioner for Patents
 P.O. Box 1450
 Alexandria VA 22313-1450

By FAX: (571)273-8300
 Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571)272-3207.



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